

Modification proposal:	Smart Energy Code (SEC) Modification Proposal (MP) 0043 – Modification to Services Force Majeure Provisions		
Decision:	The Authority ¹ determines that this modification ² should be made ³		
Target audience:	Data and Communications Company (DCC), SEC Panel, Parties to the SEC and other interested parties		
Date of publication:	5 April 2019	Implementation date:	10 Working days following approval

Background to the modification proposal

In April 2018 the Data Communications Company (DCC) Operational Performance Regime (OPR) was implemented through modification to the Smart Meter Communication Licence (DCC Licence). The key principles underpinning the design of the OPR performance measures are consistent with the Performance Measures in SEC Section H13. The OPR places performance incentives on DCC by placing 100% of the value of DCC's smart meter related margin at risk.

Following a review of current regulation, the DCC believes that neither the OPR, as part of the DCC Licence, nor the SEC provide a process for the DCC to apply for relief for 'all categories' of exceptional events. In the absence of a process for a broader concept of exceptional events in the SEC, the DCC believes there is a risk that it could be penalised unfairly under the OPR for delayed or non-delivery of DCC services due to events outside its control that are outside the scope of the Services Force Majeure definition as contained in Section M3⁴ of the SEC.

An application process exists in SEC Section M3 for Services Force Majeure (FM) under which the DCC can apply to the SEC Panel for relief for delayed or non-delivery of DCC Services. However, Services FM is narrowly defined and only applies to a limited number of exceptional events, such as acts of terrorism or war, and does not apply to all events which could be defined as outside the DCC's control.

The modification proposal

SECMP0043⁵ was raised by the DCC on 30 November 2017. This modification seeks to introduce a new application process under SEC Section H⁶, which the DCC and the Panel would follow if the DCC wishes to claim relief for exceptional events for its OPR reporting. The process put forward has been modelled on the existing Services FM process under SEC Section M3 but is distinct from this process.

The proposed solution would be applicable only to DCC's reporting under the OPR and not to the DCC service provider performance reporting under Section H13. Furthermore, the relief would not be passed to the service providers.

¹ References to the "Authority", "Ofgem", "we" and "our" are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work. This decision is made by or on behalf of GEMA.

² 'Change' and 'modification' are used interchangeably in this document.

³ This document is notice of the reasons for this decision as required by section 49A of the Electricity Act 1989 and by section 38A of the Gas Act 1986.

⁴ M3 Services FM and Force Majeure.

⁵ <https://smartenergycodecompany.co.uk/modifications/modification-to-services-force-majeure-provisions/>

⁶ DCC Services.

The complete legal text for the solution is contained in an annex to the Final Modification Report.

SEC Change Board⁷ recommendation

At the SEC Change Board meeting on 23 January 2019, it was the majority view of the Change Board that the modification would not better facilitate the second or seventh General SEC Objectives and the Change Board voted to reject this modification.

The second General SEC Objective - to enable the DCC to comply at all times with the General Objectives of the DCC (as defined in the DCC Licence), and to efficiently discharge the other obligations imposed upon it by the DCC Licence

The rationale provided by some Change Board (CB) members raised concerns that the implementation of SECMP0043 was not permissible under the DCC Licence, and that this meant that SECMP0043 would be detrimental to the second SEC Objective.

Other members did not believe there was enough evidence provided by the Proposer as to how this modification would better facilitate this SEC Objective.

One Large Supplier member disagreed. They believed the modification would marginally better facilitate the second SEC Objective by creating a suitable performance framework for the DCC to work within and remove doubt as to how any exceptional events may or may not apply to the OPR framework.

The seventh General SEC Objective - to facilitate the efficient and transparent administration and implementation of this Code

Some members felt that the exceptional events highlighted by the DCC would be covered by the existing definition of Services Force Majeure, and that this is not as narrowly defined as the DCC believes. They felt the existing provisions were adequate. Members were also concerned the definition of 'Exceptional Event' could be open-ended.

Other members did not believe there was enough evidence provided by the Proposer as to why this change would better facilitate this SEC Objective.

One Large Supplier member disagreed. They felt that while creating additional processes to deal with OPR relief does not better facilitate the seventh SEC Objective, the minor procedural changes do better facilitate this, and so on balance they felt the objective was better facilitated overall.

The Change Board believes that SECMP0043 is neutral against the other SEC Objectives.

Our decision

We have considered the issues raised by the proposal and the Final Modification Report sent to us on 23 January 2019. We have considered and taken into account the votes of the SEC Change Board on the proposal which is attached to the Change Report. We have concluded that:

- implementation of the modification proposal will better facilitate the achievement of the second and seventh General SEC Objectives;⁸ and

⁷ The SEC Panel and Change Board are established and constituted pursuant to and in accordance with DCC Licence 22.25(a).

⁸ The Objectives in accordance with DCC Licence 22.10-22.17

- directing that the change is approved is consistent with the Authority's principal objective and statutory duties.⁹

Reasons for our decision

We consider this modification proposal will better facilitate the second and seventh SEC Objectives and have a neutral impact on all the other objectives.

The second General SEC Objective - to enable the Licensee to comply at all times with the General Objectives of the Licensee and to efficiently discharge the other obligations imposed upon it by this Licence

We note the opinion of some CB members that the implementation of SECMP0043 is not permissible under the SEC and would require change to the DCC Licence, and that this in turn means that SECMP0043 would be detrimental to the second SEC Objective.

We disagree that modifications to the Smart Meter Communications Licence (the Licence) are required to implement the proposed modification. According to condition 38.9¹⁰ of the Licence, the Authority developed the provisions of Schedule 4 which define the OPR and populated them via the direction in the Licence.

In general, the Licence condition contains the formula and calculation procedures, and does not contain any conditions related to the involvement of the SEC Panel and/or SEC Parties. Stakeholder obligations and rights are set out in the SEC. The proposed modification of the SEC contains a section dealing with exceptional events that are outside DCC's control and prevent DCC from complying with OPR measures, and sets out the rights and obligations of DCC and stakeholders in these events. Having regard to the policy intent and the structure of the Licence and the SEC, we consider that the provisions proposed to be introduced by this SEC modification would not fall in the scope of the Licence.

OPR measures are based on the SEC and service provider contract performance measures to ensure that DCC performance reporting to SEC Parties and Ofgem is consistent. The proposal, by introducing a decision-making process under the SEC, ensures that this consistency is maintained.

It is for these reasons that we believe SECMP0043 will better facilitate the second General SEC Objective.

The seventh General SEC Objective - to facilitate the efficient and transparent administration and implementation of the SEC

A few Change Board members felt that the existing definition of Services Force Majeure is not as narrowly defined as the DCC believes. They also felt that the existing provisions were adequate. Members were also concerned the definition of 'Exceptional Event' could be open-ended.

We have previously noted that we support the idea of additional transparency and industry consultation on what is considered an exceptional event¹¹. We recognise that the proposer is seeking additional clarity and we consider that, as decision-making would sit under the SEC Panel, the proposed process is consistent with existing processes.

⁹ The Authority's statutory duties are wider than matters that the Panel must take into consideration and are detailed mainly in the Electricity Act 1989 as amended and the Gas Act 1986 as amended.

¹⁰ Condition 38. Determination of the BMP Adjustment.

¹¹ https://www.ofgem.gov.uk/system/files/docs/2017/09/1._decision_on_dcc.pdf

We note the risk that OPR may be undermined by excessive use of a 'relief' process. We would expect this risk to be mitigated by placing the decision on whether the DCC is given relief with the SEC Panel. Furthermore, DCC must notify to the SEC Panel within five days of the occurrence of the OPR Exceptional Event, and the Panel is required to provide a decision within ten Working Days of the DCC's application. We expect these time constraints to limit the process to events where DCC can strongly evidence a Force Majeure event.

It is for these reasons that we believe SECMP0043 will better facilitate the seventh General SEC Objective.

Other issues

We also examined the costs associated with SECMP0043 as identified within the FMR. There are no direct costs that will arise from its implementation, apart from the administrative costs of publication of a new version of the SEC on the SEC Website and issuing this to SEC Parties and reviewing and updating any impacted SEC guidance materials, which are estimated £1,200.

Decision notice

In accordance with standard licence condition 23 of the Smart Meter Communication licence, the Authority hereby determines that modification proposal SECMP0043 'Modification to Services Force Majeure Provisions' should be made.

Jacqui Russell

Head of Metering & Market Operations

Signed on behalf of the Authority and authorised for that purpose